

MARCO A. MENA)	
Claimant)	
VS.)	
)	Docket No. 1,000,201
ADVANCED WARNINGS)	
Respondent)	
AND)	
)	
INSURANCE COMPANY STATE OF)	
PENNSYLVANIA)	
Insurance Carrier)	

Claimant, however, contends he not only injured his low back in the October 26, 2001, work-related accident but also suffered injury to his neck and shoulders. Furthermore, claimant argues that Dr. Murati examined and evaluated claimant and opined that claimant has injuries to his low back, neck and shoulders and all of those injuries are related to his October 16, 2001, lifting accident while he was employed by the respondent. Claimant also argues, because claimant proved that all of his alleged injuries are the result of a work-related accident while he was employed by the respondent, Dr. Murati should remain as his authorized treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board (Board) makes the following findings and conclusions:

The Board concludes it has jurisdiction to review this appeal. The Board finds the issue on appeal is the question of whether the October 26, 2001, lifting accident while working for the respondent not only caused injury to his low back but also caused injury to his neck and shoulders. Thus, the Board finds the jurisdictional issue is whether claimant suffered an accidental injury to his neck and shoulders that arose out of and in the course of his employment with the respondent.¹

Claimant was injured while employed by the respondent in a lifting accident on October 26, 2001. Respondent does not dispute that claimant injured his low back as a result of that accident but does dispute that he also injured his neck and shoulders. Claimant filed an Application for Hearing on November 16, 2001, alleging that as a result of the October 26, 2001, work-related accident he injured his low back, left leg, hip, neck, and shoulders.

Claimant notified the respondent of the accident but was not offered medical treatment. Claimant sought medical treatment on his own at the Wichita Family Medicine Specialists. Claimant saw Rolland Enoch, M.D. on November 6, 2001. Dr. Enoch diagnosed claimant with sacroiliitis. He prescribed medication, recommended ice therapy three times a day and restricted claimant's work activities. Claimant returned to see Dr. Enoch on November 13, 2001, with no improvement. Medication was again prescribed and claimant was taken off work for a two week period to undergo physical therapy.

Claimant testified he not only made complaints to Dr. Enoch of the pain and discomfort in his low back but also of pain and discomfort in his neck and shoulders. Dr. Enoch's medical records, however, do not indicate that claimant made any complaints in regard to his neck and shoulders. But the physical therapy initial evaluation completed at Wesley Medical Center on November 16, 2001, does indicate, "He is also complaining of pain in his distal cervical area into his right shoulder."²

Claimant saw Dr. Enoch again on November 13, 2001. At that time, Dr. Enoch referred claimant for a MRI examination and referred claimant to physical medicine rehabilitation physician Phillip R. Mills, M.D. The respondent's insurance carrier did not authorize the MRI examination or the referral to Dr. Mills. Instead, the insurance carrier referred claimant to Dr. Gery Hsu for a neurosurgical consultation.

¹ See K.S.A. 44-534a(a)(2).

² P.H. Trans., Cl. Ex. 3. (May 2, 2002).

Dr. Hsu had claimant undergo a MRI examination on December 10, 2001. Dr. Hsu examined claimant on December 12, 2001. The MRI examination revealed mild posterolateral disc bulging at L4-L5 vertebral level. Claimant had complaints of low back pain with radiation into the left thigh and down the left leg to the foot. Dr. Hsu did not recommend any active treatment because he found claimant had no anatomical nerve root compression or problem with his lumbosacral spine. Claimant requested a return to work release from Dr. Hsu. But Dr. Hsu refused to give the claimant a release because the MRI examination had not indicated that claimant should have been off of work. As noted above, Dr. Enoch took claimant off of work before respondent's insurance carrier referred claimant to Dr. Hsu for evaluation and treatment recommendations.

Because claimant remained symptomatic and Dr. Hsu had not recommended any treatment, claimant requested a preliminary hearing which was held on January 8, 2002. Claimant's preliminary hearing requests were temporary total disability compensation, a change in the authorized treating physician, and payment of Dr. Enoch and Dr. Hsu's medical bills as authorized medical.

As a result of that preliminary hearing, the ALJ, in a January 8, 2002, preliminary hearing Order, granted claimant's request for temporary total disability. Also, claimant's request for a change in the treating physician was granted by ordering respondent to provide claimant with a list of three physicians for him to select a new treating physician. Additionally, the ALJ ordered respondent to pay as authorized medical expenses the treatment incurred with Dr. Enoch and Dr. Hsu.

The claimant selected orthopedic surgeon John P. Estivo, D.O., as his new authorized treating physician. Dr. Estivo first evaluated and examined claimant on February 4, 2002. Claimant described his October 26, 2001, work-related accident and resulting complaints of pain in his lumbar spine, left leg, neck and into his trapezius musculature. Dr. Estivo's impression was lumbar sprain with occasions of radiculopathy. The doctor recommended claimant undergo an EMG/NCT test of both lower extremities. He placed claimant in a physical therapy program for one month. Dr. Estivo prescribed medication and released claimant with work restrictions.

Dr. Estivo saw claimant again on March 4, 2002, after claimant had undergone the EMG/NCT testing. The test results of both lower extremities were normal. Claimant was continued on medication, physical therapy and work restrictions.

The problem that arises at this point in the litigation is claimant's continued complaints of pain and discomfort in his neck and shoulders. Claimant testified he always complained of pain and discomfort in his neck and shoulders to all his treating physicians

since the October 26, 2001, accident. Dr. Enoch and Dr. Hsu's medical records do not reflect that claimant made any complaints of pain and discomfort in his neck and shoulders during their examination and treatment of claimant. But the physical therapy evaluation from Wesley Medical Center dated as early as November 16, 2001, indicate the claimant had complaints of pain in his cervical area and right shoulder. In addition, claimant's attorney corresponded with respondent, respondent's attorney, Dr. Enoch and Dr. Estivo and all of those letters contain a description of claimant's injuries as back, left leg, hip, neck and shoulders.³ Also, Dr. Estivo's initial medical record of his examination of claimant on February 4, 2002, indicates that claimant had complaints of pain across his neck and into his trapizius musculature as well as his lumbar spine. In addition, claimant's physical therapy records dated February 5, 2002, noted claimant had complaints of neck pain.

The initial information sheet completed for Dr. Estivo indicates that claimant described injuries to his low back, left leg, hip, neck and shoulders. But the left leg, hip, neck and shoulders were crossed out and circled not approved. The words low back were also circled and the word only was placed outside the circle. Because claimant was not receiving treatment for his low back and shoulders while being treated by Dr. Estivo, claimant filed for another preliminary hearing.

But instead of a preliminary hearing being held in person, a telephone conference was held on February 21, 2002, between the ALJ and the parties' attorneys. No transcript was made of this telephone conference. In a preliminary hearing Order dated February 25, 2002, the ALJ clarified that Dr. Estivo was authorized to treat all of claimant's body parts causally related to his October 26, 2001, accident.

After the February 25, 2002, preliminary hearing Order, Dr. Estivo did not examine or otherwise treat claimant's complaints of pain in his neck and shoulders. Thus, claimant filed a request for yet another preliminary hearing. That preliminary hearing was held on April 2, 2002. Claimant's requests were for another change in physician because Dr. Estivo refused to examine or treat claimant's neck and shoulder complaints. In an April 8, 2002, preliminary hearing Order, the ALJ granted claimant's request for a change in treating physician and appointed Dr. Pedro Murati to treat claimant.

The May 8, 2002, preliminary hearing Order, that is the subject of this appeal, resulted from the respondent's request for a preliminary hearing. Respondent asked the ALJ to terminate the authorized medical treatment for claimant's neck and shoulders because those alleged injuries were not the result of claimant's October 26, 2001, work-related accident. Furthermore, the respondent requested the ALJ to return claimant to Dr. Estivo as claimant's authorized treating physician for only his low back complaints.

³ P.H. Trans., Cl. Ex. 1 (May 2, 2002).

Respondent argues Dr. Estivo's April 3, 2002, opinion that states that claimant's cervical spine and shoulder complaints are not related to his October 2001 accident proves that those injuries did not arise out of and in the course of his employment with respondent.

Claimant, however, contends the preliminary hearing record that contains claimant's testimony, claimant's attorney's letters and physical therapy records all prove that claimant had neck and shoulder complaints contemporaneously after the October 26, 2001, accident. Additionally, Dr. Murati's medical report dated April 17, 2002, was admitted into the preliminary hearing record and found claimant with neck and bilateral shoulder pain. After taking a history from the claimant and conducting a physical examination of claimant, Dr. Murati's impression was cervical strain, bilateral rotator cuff strain and lumbar sacral strain with left sided radiculopathy. Dr. Murati, within a reasonable degree of medical certainty, concluded that all of claimant's diagnoses were the result of his October 26, 2001, work-related accident.

The Board concludes that the ALJ's May 8, 2002, preliminary hearing Order should be affirmed. The Board finds, at this juncture in the proceedings, the greater weight of the evidence contained in the preliminary hearing record proves that claimant not only suffered a low back injury but also suffered neck and shoulder injuries as a result of the October 26, 2001, lifting accident while working for the respondent.

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Nelsonna Potts Barnes' May 8, 2002, preliminary hearing Order, should be, and is hereby, affirmed

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

c: Steven Wilson, Attorney for Claimant
Kim R. Martens, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation